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PETITION NOT PRINTED

No. 143

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIE LEE STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

Cases:

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OPINIONS BELOW

The majority (R. 380–394)[1] and dissenting opinions (R. 394–399) of the court of appeals, sitting *en banc*, are reported at 275 F. 2d 617, 626.

[1] "R." refers to the record printed for the use of this Court. Counsel have stipulated that the portions of the original record not printed might nevertheless be referred to in the brief and arguments in this Court. This original record, on file with the Clerk, includes: the transcript of the present trial (November 1958), which will be referred to as "Tr."; the transcript of petitioner's first trial in June 1953; the transcript of the second trial in January 1955; the transcript of petitioner's competency hearing in October 1958; a volume titled "Joint Appendix"; and an "Original Record on Appeal" containing pleadings and other documents relating to all three trials.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1960 (R. 399). A petition for rehearing was denied on March 30, 1960 (R. 400). The petition for a writ of certiorari was filed on April 25, 1960 and granted on June 13, 1960 (R. 400; 363 U.S. 818). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the unique circumstances of this case, prejudice of a character requiring a mistrial resulted when the defendant, testifying in his third trial, was asked by the prosecuting attorney whether he had testified at his prior trials, the question never being answered and the failure to testify at the prior trials not otherwise being alluded to during the course of the trial.

2. Whether there was improper cross-examination of a defense psychiatrist.

3. Petitioner also raises but does not argue the following question: Whether evidence of his low intelligence quotient required an instruction to the jury that he could be found guilty of second degree murder.

STATEMENT

On April 13, 1953, an indictment was returned in the United States District Court for the District of Columbia, charging petitioner with the murder, on March 12, 1953, of one Harry Honikman in the commission of a robbery (R. 16), and, in a second count, with robbery (R. 16). The present proceeding stems

from petitioner's third conviction on both counts (R. 27, 378–379).[2] By a 5–4 decision, the court of appeals, sitting *en banc*, affirmed the conviction (R. 399), the dissenting judges expressing the view that it was reversible error for the prosecutor to ask petitioner on cross-examination a question about not having taken the stand at a prior trial (R. 394–399). Petitioner's mandatory sentence was the death penalty (R. 33–34).

The principal issue argued by petitioner relates to the propriety of his cross-examination.[3] He also states as a question presented (included also in the petition), but does not argue, the refusal of the trial judge to instruct the jury that it could convict petitioner of second degree murder because of his low intelligence quotient. Petitioner does not here question the sufficiency of the evidence supporting the jury verdict that he committed the offense and was sane at that time, a determination fully reviewed by the majority of the court below (R. 380–394). However, the questions raised must be judged in the light of the whole record. We therefore outline the facts of the crime, the evidence on insanity, and, finally, the

[2] Following each of two previous convictions (in 1953 and 1955) on these charges, the court of appeals reversed for reasons bearing on the defense of insanity—on the first appeal (214 F. 2d 879), because of an error in the instructions on insanity, and on the second appeal (247 F. 2d 42), because of error in the closing argument of the prosecutor as to the credibility of petitioner's lay witnesses.

[3] Petitioner also argues error in the cross-examination of the defense psychiatrist; the facts bearing on that issue are set forth in the Argument on that point. *Infra*, pp. 39–40.

pertinent proceedings on the cross-examination of petitioner.

A. THE FACTS OF THE CRIME

The evidence establishing that petitioner killed one Harry Honikman during the perpetration of a robbery was unchallenged, either at the third trial or at the two prior trials.[4] The facts show that, on the evening of March 12, 1953, shortly before closing time, petitioner entered a grocery store in Washington, D.C., owned by one Harry Honikman, and purchased a bottled soft drink and a bag of potato chips, later throwing the bag in the wastebasket. Shortly thereafter, petitioner ordered another bottle of soda. Mr. Honikman advised him it was closing time (about 9:00 p.m.), and asked if he would mind taking the soda with him. As Mr. Honikman came from behind the counter to give petitioner his purchase, petitioner drew a pistol and said, "Okay, this is it" (Tr. 25). He then demanded the contents of the cash register, and shot Mr. Honikman, who died instantly. Petitioner thereupon removed some $416 from the cash register, and left.

Mr. Honikman's wife and daughter, who were in the store when petitioner first entered, witnessed the

[4] On the first appeal, writing for a unanimous court of appeals, Judge Bazelon stated: "There is not the slightest doubt from the evidence * * * that [petitioner] committed the offense." 214 F. 2d at 880. Again, in his opinion on the second appeal, Judge Bazelon observed: "In both trials the evidence made it unmistakable that, if the appellant was legally sane, he was guilty of the homicide charged against him." 247 F. 2d 42, 43. The evidence adduced in the third trial is summarized in the majority opinion below at R. 380–381.

entire transaction including the shooting, and later selected petitioner out of a police line-up as the slayer.[5] In addition, expert testimony was adduced revealing that petitioner's fingerprints were contained on a potato chip bag and an empty soda bottle found in the grocery shortly after the killing (Tr. 87–95, 98–108), and that his revolver was the murder weapon (Tr. 184–194).

B. THE DEFENSE OF INSANITY

At this, as at the prior trials, petitioner posited his defense on the claim that he was insane at the time of the homicide. This defense had a three-fold aspect.

1. First, the defense introduced lay testimony—of relatives and friends—concerning petitioner's conduct and behavior over a period of years preceding the homicide.[6] The essence of this testimony was that petitioner had committeed many bizarre and inexplicable acts over the years preceding the crime indicative of mental derangement (see, for example, testimony of petitioner's wife, Annie Lee Stewart (R. 87–99)).[7]

[5] The testimony of deceased's daughter, Edith Honikman Burka, is set forth at Tr. 20–51. The testimony of his wife, Beky Honikman, given at the first trial, was read into the record (Tr. 53–56).

[6] The lay witnesses included, *inter alia*, petitioner's cousin (Irene Anderson, R. 35–43); his sister-in-law (Julia Daniels, R. 44–56); an Army acquaintance (Yancy Peterson, R. 58–62); his sister (Geneva Mason, R. 62–73); his employer (James Erby, R. 73–80), and his wife (Annie Lee Stewart, R. 87–109).

[7] Other testimony recounting such prior conduct is set forth at R. 37–38, 41–42, 45–46, 58–62, 73–80, 111–114, 116–119. The government introduced rebuttal lay testimony of one James Hamilton who testified that he had known petitioner for six

2. Second, portions of petitioner's Army record were read to the jury (R. 129–131).[4] This report stated that petitioner had scored a 63 on the verbal sub-test, 76 on the performance sub-test, and 65 on the combined scale of the Wechsler-Bellevue Intelligence examination and that this "would indicate intelligence falling within the feeble-minded range," although there was no "evidence of neurosis or psychosis" (R. 130). The report concluded that petitioner was "Illiterate but mentally adequate" (R. 131). Dr. Ernest Y. Williams, the defense psychiatrist, stated that an I.Q. of 65 reflected an intelligence within the moronic range, a condition not capable of cure (R. 152, 162).

In rebuttal, two government psychiatrists, Drs. Elmer Klein and Morris Kleinerman testified that, while petitioner was of low average intelligence, he was not a mental defective (*Dr. Klein*: R. 199–200, 202–203, 213–215; *Dr. Kleinerman*: R. 226–227, 231–232, 261–262, 266–267). As Dr. Kleinerman put it, the verbal sub-test of 63 would be "affected by [petitioner's] educational achievements," while the performance sub-test rating of 76 reflected "[n]ative endowment, and this is more nearly his potential than the other

years prior to the homicide and that, from 1950–1953, he had seen petitioner about "once or twice a week," and believed him to be of sound mind on March 12, 1953, the date of the homicide (R. 274–278).

[4] Petitioner was drafted in 1943 and, after his honorable discharge in 1945, he reenlisted. In 1946 he was discharged (R. 129). By stipulation of counsel this record was not offered in evidence.

which depends greatly on his educational achievements" (R. 231).[4]

Defense counsel's request that the trial judge instruct the jury that, from the evidence of petitioner's low intelligence it might find him guilty of murder in the second degree, was denied (see Requests for Instructions Nos. 4 and 6, R. 29–31).

3. Lastly, Dr. Williams testified that he had examined petitioner some three months after the homicide —in late June 1953—for two hours and that, from this examination, he was unable to determine if petitioner was insane on the date of the crime (R. 144, 165, 170). However, when asked to assume the truth of the lay testimony adduced in petitioner's favor (*supra*, p. 5), and the validity of petitioner's Wechsler-Bellevue rating, and to consider these additional elements in addition to his personal diagnosis, Dr. Williams stated his belief that on March 12, 1953, petitioner was suffering from both a mental disease and mental defect (R. 145–151, 153, 157–158, 175, 180–182).

On the other hand, Drs. Klein and Kleinerman, who had each examined petitioner some two weeks after the offense (Dr. Klein on March 26, 1953, for about an hour; Dr. Kleinerman for two hours on March 25, 1953), agreed that petitioner was not suffering from a mental disease or defect on the date of the homicide

[4] Similarly, see the testimony of Dr. William G. Cushard, a psychiatrist at St. Elizabeth's hospital who had examined petitioner on January 2, February 3, and April 14, 1958 (R. 343–344, 352; see also testimony of Dr. Mary V. McIndoo, a psychiatrist on the staff at D.C. General Hospital (R. 361–362)).

(*Dr. Klein:* R. 195–197, 199–202; *Dr. Kleinerman:* R. 228–229, 231–232, 261–262).

C. PETITIONER'S CROSS-EXAMINATION

Petitioner, who had not testified on the first two trials, took the stand at the third trial and gave testimony which the court below described as "gibberish without meaning" (R. 381), revealing that "he was suffering from a grave mental disease or defect * * * or he was malingering—staging a show of mental aberration to influence the judge and jury" (R. 381–382). When his counsel asked him at the outset whether he would swear to tell the truth, he answered, "I don't know" (R. 132). In denying he was married, he stated that "nobody is married" (R. 133). When asked if he knew that his attorney's name was Mr. Carey, he responded: "You asked—you know what your name is. Don't ask me. I ain't asked what your name is, is I? You go ask yourself" (R. 134). He testified that he was going to kill until he conquered; that he would be the master; and that he had spoken many times with God who had told him to conquer all the peoples of the world (R. 134–136). He further said that he never heard the name Harry Honikman; that he did not kill Mr. Honikman; that he had killed "nobody yet"; and that as far as he was concerned he was charged with nothing (R. 134). When inquiry was made as to whether he had ever been tried for first degree murder before this time, petitioner replied, "I ain't never been tried. I ain't never been tried" (R. 135).

On cross-examination, petitioner continued this same appearance of irrationality and faulty memory. He did not recall, *inter alia*, being examined by any of the psychiatrists, or being in the Army, or where he was living, or whether he was arrested and for what (R. 137–139). The following colloquy then occurred (R. 139–140):

> Q. Willie, you were tried on two other occasions.
>
> A. Well, I don't care how many occasions, how many case—you say case. I was a case man once in a time.
>
> Q. This is the first time you have gone on the stand, isn't it, Willie?
>
> A. What?
>
> Q. This is the first time you have gone on the stand, isn't it, Willie?
>
> A. I am always the stand, I am everything, I done told you.
>
> Mr. SMITHSON [prosecuting attorney]. That is all.
>
> The WITNESS. You and nobody else going ever to stop me.
>
> The COURT. Mr. Carey, anything further?
>
> Mr. CAREY. That is all.

After the witness was excused, defense counsel, out of the hearing of the jury, moved for a mistrial on the basis of the prosecutor's question as to petitioner's taking the stand for the first time. This further colloquy then ensued (R. 140–141):

> The COURT. That wasn't mentioned, was it?
>
> Mr. CAREY. He mentioned it, Mr. Smithson. Read it. I would like to have you read it.
>
> The COURT. The conviction?

Mr. CAREY. No, taking the stand. This is the first time you have taken the stand, Willie, isn't it.

Mr. SMITHSON. I think that is a fact that the Jury is entitled to know, Your Honor. On so many occasions they have referred to the record in the first case or the second case.[10]

MR. CAREY. I think it is highly prejudicial. I would like to have it read.

Would you read that comment of the prosecutor?

(Whereupon the indicated question was read by the reporter.)

The COURT. Motion denied.

Petitioner renewed the motion for a mistrial at the close of the evidence (R. 368) and assigned the denial of the motion as error in his motion for a new trial (see p. 32 of Joint-Appendix on file with the Clerk of this Court).

Thereafter, to rebut petitioner's appearance of irrationality, testimony was adduced by the government from lay and psychiatric witnesses that petitioner was sane and competent at the time of trial. The pyschiatrists testified that petitioner was malingering (see R. 282–287, 288–328, 338–339, 343–348, 356, 359–360, 386–387).[11]

[10] Petitioner's counsel had previously informed the jury that petitioner had been tried before by reading excerpts from testimony adduced at the former trials (R. 35; see also Tr. 47).

[11] Similarly, at the pretrial competency hearing held on October 28–29, 1958, Dr. Mary V. McIndoo testified that she had examined petitioner and believed him competent to stand trial (see Transcript of Competency Hearing on File with the Clerk of this Court, pp. 111–115). Following this hearing, on October 30, 1958, the district judge (Letts, J.) issued an order

SUMMARY OF ARGUMENT

I

During the cross-examination of petitioner, government counsel asked, and received an incoherent reply to, the following question: "This is the first time you have gone on the stand, isn't it, Willie?" No other mention was made of petitioner's failure to testify at his two prior trials during the course of the present trial, in the closing arguments, or in the charge to the jury. The principal question in this case is whether the asking of that question required a mistrial to be declared.

We agree with petitioner that the question should not have been asked if it did in fact have a prejudicial effect, for its probative value for the only purpose for which it was logically relevant—simply as one of a series of questions to test petitioner's comprehension and memory—was hardly sufficient to warrant incurring a risk of prejudice. Thus the only issue in dispute is whether the asking of the question did, as petitioner assumes, have a prejudicial effect. In our view, there was in fact no substantial likelihood that the jury would draw from the question an inference adverse to petitioner and that whatever likelihood of prejudice there was, if any, could have been forestalled by an admonition to the jury that leading questions are not evidence of the facts assumed, and a mistrial was not required.

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finding petitioner of sound mind, able to understand the nature of the proceedings against him, and to assist in his own defense. The court found him to be a malingerer (R. 26–27).

In the ordinary case in which the issue is whether the defendant committed the acts charged, the danger that the jury will infer from a defendant's failure to testify that he did commit the acts is an evident one. Petitioner assumes that because such a danger is present in most cases it can be accepted without examination that there was a similar danger here. We submit, however, that, in the unique circumstances of this case, there was not only little likelihood that the jury was even aware that petitioner had not previously testified but there was no way in which that fact, even if brought to the jury's attention, could have been prejudicial to petitioner.

In the first place, since the question remained unanswered, the jury was in fact never told of petitioner's prior silence, and in view of the context in which the question was asked and the little emphasis given to it, it seems unlikely that the question made any more impression upon the jury than upon the judge, who was not even aware of its being asked. Nor was the matter ever again alluded to or the jury invited, implicitly or explicitly, to draw any adverse inferences from it.

More importantly, there was no way in which the jury could have made use of the fact of petitioner's prior silence, even if established, to resolve any of the issues in this case. On the question whether petitioner had committed the acts charged, no attempt was made to deny that fact at the third trial itself, and the failure previously to deny it could add nothing to the failure to do so then. Nor could the jury draw any inference from the prior

silence in determining whether petitioner was malingering in his "testimony" at the third trial—*i.e.*, in his implied representation that he was then incompetent—for, if petitioner were as irrational as he purported to be, he obviously lacked the capacity to make a rational judgment whether or not to testify in his previous trials.

The "prejudicial effect" of which petitioner complains must, therefore, be in the danger that the jury inferred from his prior silence that he was sane at the time of the offense. Petitioner does not attempt, however, to explain how such an inference might be drawn, and in our view there was no way in which it could be. The reasoning that if petitioner had been insane he would have testified concerning his condition at the time of offense is precluded by his appearance on the stand as being incompetent at the time of the trial. If the jury believed that appearance, it would fully explain his failure to testify previously. If they believed he was feigning, on the other hand, his failure to testify at the prior trials could add nothing to his refusal to give meaningful testimony at the third trial and his attempt, instead, affirmatively to deceive the jury.

The question here, moreover, is not simply whether the question was improper in the sense that an objection to it should have been sustained, or whether there was some remote possibility of prejudice, but whether the possibility of prejudice was so great that it could not be avoided by any means short of a mistrial. The trial court did not, in this case, rule

that the question was a proper one or refuse to admonish the jury to ignore it. All that occurred was that the question was asked, an unresponsive answer was received, and petitioner's motion for a mistrial was denied. Not having requested other curative relief—such as an admonition to the jury to ignore the question—petitioner must stand here on his claim that nothing less than a mistrial was adequate. Nor is there any reason to believe that the failure of counsel to ask for curative instructions was inadvertent rather than deliberate. In the context in which the question was asked, as we have noted, it was given so little emphasis that not even the trial judge took note of it, and defense counsel could quite reasonably have concluded that not only was an admonition unnecessary but it would only serve to emphasize to the jury an incident that they had very likely otherwise overlooked.

When the defendant has been represented by competent counsel who has chosen, for good reasons, not to seek curative instructions, a mistrial ought not be required even in a capital case, we submit, without at least some showing not only that there was something more than a remote possibility of prejudice, but that other measures, short of a mistrial, were inadequate to forestall that possibility. As we have shown, the claim of prejudice here depends upon a series of propositions some of which are at best speculative and others of which are simply unsupportable: (1) that the jury took note of a question so little emphasized that not even the trial judge was aware of it; (2) that, although the question was never

answered, the jury inferred from the question the fact that petitioner had not previously testified; and (3) that the jury then inferred from petitioner's prior silence, by a process of reasoning still to be explained, that petitioner was sane at the time of the offense. And as to the efficacy of curative instructions to foreclose the possibility of prejudice (if any), this Court is apparently asked simply to assume that a jury will not follow even so simple and direct an admonition as one telling it to ignore a single irrelevant and unanswered question. In short, petitioner has, we submit, failed to show either a possibility of prejudice or the inadequacy of a simple instruction to the jury to overcome whatever possibility of prejudice there may have been.

II.

There is no merit to petitioner's claim of prejudicial error in the cross-examination of Dr. E. Y. Williams, the defense expert in psychiatry. In light of the testimony adduced on direct examination of Dr. Williams and as a matter of valid impeachment, it was proper to ask him whether he agreed with the published views of a colleague (Dr. Benjamin Karpman) under whom he had received training. In any event, as the court below pointed out, the question was totally harmless since it produced "nothing except a positive disavowal by the witness of the viewpoint attributed to Dr. Karpman." (R. 389).

ARGUMENT

I

ASKING PETITIONER WHETHER THIS WAS THE FIRST TIME HE HAD TAKEN THE STAND WAS NOT PREJUDICIAL AND DID NOT REQUIRE A MISTRIAL

A. INTRODUCTION

During the course of the cross-examination of petitioner, government counsel asked, and received an incoherent reply to, the following question: "This is the first time you have gone on the stand, isn't it, Willie?" The incident occurred on the second day of a trial that lasted five days, and the matter was not again alluded to, in the presence of the jury, during the rest of the trial, in the closing arguments, or in the charge to the jury. Immediately after the incident, petitioner moved for a mistrial, which the court denied without comment. The primary question in this case is whether, because of the asking of that single unanswered question,[12] the motion for a mistrial should have been granted.

In approaching that problem we start on common ground with petitioner as to the meaning of *Grunewald* v. *United States*, 353 U.S. 391. In that case, a defendant in a conspiracy trial (Halperin), having given innocent answers to questions concerning his relationship with the alleged co-conspirators, was

[12] Petitioner seems to draw some comfort from the fact that petitioner first replied "What?" and counsel then repeated the question, so that, as petitioner says, the question was "twice" asked (Pet. Br. 2, 7). While we do not mean to deny that fact, it seems to us that a question repeated because not heard or understood is more meaningfully described as one question rather than two, and it is for that reason that we refer in this brief to the "single" question.

required on cross-examination to admit that he had pleaded the Fifth Amendment to the same questions before a grand jury. The jury was then instructed that it might consider that evidence as bearing on the defendant's credibility. Noting that there was in fact no inconsistency between the defendant's refusal to answer questions before the grand jury and his testimony at the trial, this Court held that the evidence of his prior invocation of the privilege was of less than negligible value in impeaching the defendant's testimony and should therefore have been excluded—under the traditional standards of materiality—because of the evident danger that the jury would make impermissible use of it by equating a claim of the privilege with guilt. As stated by the Court (p. 424):

> * * * in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since * * * there was no true inconsistency involved * * *. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible.

In substance, therefore, *Grunewald* was simply a particularized application of the accepted rule of evidence that otherwise relevant and competent evidence

may nevertheless be excluded if its probative value, properly used, is slight and the danger of its improper use is great.

On that principle, we are in agreement with petitioner. Our disagreement arises only over its application to the unique circumstances of this case. Petitioner simply assumes that the question asked here had a "prejudicial effect" and then argues that the value of the inquiry to the government was insufficient to outweigh that likelihood of prejudice. We, however, concede what petitioner argues and challenge only what petitioner assumes. That is, while we think the inquiry was a relevant and competent one, we concede that it was of but negligible importance to the government's case, and argue only that it was equally unprejudicial to petitioner. In short, we are in agreement with petitioner on the negligible value of the inquiry to the government, and the only disagreement—and the only question to be resolved by this Court—is whether the asking of the question was in fact prejudicial to petitioner. If it was not in fact prejudicial, the question, otherwise competent and relevant, was a proper one and, for that matter, even if it were not, there would be no basis for declaring a mistrial. If it was prejudicial, on the other hand, we concede that the question should not have been asked, and the only issue then becomes whether the prejudicial effect could have been avoided by an appropriate admonition to the jury or whether the prejudice was so great that a mistrial was required.

We will first show for what purpose we consider the question asked to have been relevant and competent

and why it was of but negligible importance to the government for that purpose. We will then show that the question could have had no impact upon the jury for any other purpose, permissible or impermissible. Next we will show that, even if it did, the prejudicial effect could hardly have been so great that it could not have been cured by some measure (admonitions to the jury) short of declaring a mistrial. We will note, finally, why this case provides no occasion for a re-examination of *Raffel v. United States*, 271 U.S. 494, as suggested by petitioner.

B. THE QUESTION WAS RELEVANT AND COMPETENT AS ONE OF A SERIES OF MEMORY-TESTING QUESTIONS BUT WAS OF NO IMPORTANCE FOR THAT PURPOSE.

Although it had little effect on the outcome of the case, it is appropriate to state explicitly what we consider to have been the only proper purpose for which the question asked was relevant—namely, to test petitioner's memory and comprehension in an attempt to reveal as malingering his seemingly irrational behavior on the stand. The relevance of the question for that purpose is, we think, evident from the context in which it was asked.

Petitioner's testimony (which appears in full at R. 132–140) was, on both direct and cross-examination, almost entirely irrational and unresponsive, amounting to, as the court of appeals said, "gibberish without meaning" (R. 381). Its verbal content being of no significance, the only relevance of the testimony as a whole lay in its implied representation that petitioner was then (at the time of the trial) totally incompetent. It was the government's belief,

supported by psychiatric and lay testimony, that petitioner was malingering in an effort to influence the jury to find that he was insane at the time of the crime.[11] The only issue to which the cross-examination could be directed, therefore, was whether or not petitioner was malingering—*i.e.*, whether his implied "testimony" that he was incompetent was "credible."

Like the direct examination, the cross-examination was necessarily limited, by the nature of petitioner's responses, to the asking of simple questions relating to petitioner's personal history, his family, the charges against him, the prior proceedings, and recent events—all having no purpose but to test out petitioner's memory and comprehension. It was apparently the hope of the prosecutor that, in responding to a series of simple memory-testing questions, petitioner might in some way—perhaps by dropping his guard and responding rationally or, perhaps, by "overplaying" his pose of knowing nothing of his own circumstances—tip his hand and give the jury a clue that he was malingering.

It was as the last of the series of such questions—none of which related to any fact material to the

[11] The government's view that petitioner was feigning was based on expert testimony adduced at the pretrial competency hearing, as well as from a psychiatrist who testified that petitioner had been under observation for some time up until the date of trial and that these observations indicated that he was not suffering from mental illness but was a malingerer (see the Statement, *supra*, p. 10, n. 11). The government had corroborating information from lay witnesses and psychiatrists who had had the opportunity to observe petitioner regularly over a period of some years up to the date of the third trial. All of this evidence was introduced by the government on rebuttal (R. 282–287, 288–325, 338–350, 356–361).

case (*e.g.*, where petitioner had gone to school, whether he was in the Army, what work he did, if he remembered being arrested)—that the question challenged here was asked. In that context, its relevance, like that of the series of which it was a part, did not depend upon the *fact* inquired about (whether he had previously testified) but upon petitioner's capacity to *remember* the fact and respond rationally to the question. In one respect, indeed, that question may have been somewhat more relevant than the others asked, since petitioner had stated on direct examination that he had "never been tried" (R. 135), and an admission by him that he remembered not having taken the stand at his prior trials would have tended to show that his purported failure to remember being tried was a sham. Quite apart from that, however, the question was at least as relevant and competent, for memory-testing purposes, as the other questions asked and was, therefore, improperly asked only if, because of its subject matter, it had collateral prejudicial effects which the other questions did not.

We must acknowledge, however, that for memory-testing purposes the asking of that particular question was of at best only negligible importance to the government, for the attempt to test petitioner's memory and comprehension could have proceeded equally well without it, and there were undoubtedly other questions that could readily have been substituted for it. In short, for that purpose the question, while relevant and competent, was of only marginal materiality and the posing of it could be justified under *Grune-*

would only if it did not in fact have collateral prejudicial effects. If it did, we concede, as we noted at the outset, that the question should not have been asked.

The purpose of the question discussed above is the one that seems to us to be suggested by its context and is the only purpose to which, upon analysis, the question seems logically relevant. The prosecutor's statement, made in answer to the motion for a mistrial, that "I think that is a fact the Jury is entitled to know" (R. 140) suggests, however, that he may have also had in mind a different purpose, turning not on petitioner's memory of the fact but the *fact* itself—namely, the use of petitioner's failure to testify at the prior trials as a prior "inconsistency" with which to "impeach" his "testimony." That purpose was also urged upon, and accepted by, the court of appeals as a permissible reason for seeking to establish the fact as such (R. 392–393). Upon further reflection, however, it seems to us that, as pointed out in the next Point, the prior failure to testify, even if established, would have had no logical tendency to contradict petitioner's only "testimony" in this case—*i.e.*, his implied assertion of incompetence. It may be that, had petitioner responded rationally to the line of inquiry, pursuit of the inquiry further might have, as the court of appeals suggests (R. 392), developed an inconsistency useful for impeachment purposes. But we do not now attempt to justify the question on any ground other than its utility for memory-testing purposes.

C. THE QUESTION COULD HAVE HAD NO SUBSTANTIAL EFFECT UPON THE JURY, PERMISSIBLE OR OTHERWISE

In the usual case in which the defendant does not testify (or did not do so in a prior trial), the danger that the jury will draw an impermissible inference of guilt from that failure is an evident . . e. for the premise upon which the inference depends—"If he didn't do it, he would have said so"—is one which must seem obvious to a lay jury. Petitioner and the dissenting judges in the court below assume that, because that danger is present in most cases, it can be accepted without examination that the same danger was present here. It is our view, however, that in the unique circumstances of this case the question asked, apart from its relevance as one of a series of questions probing petitioner's comprehension and memory, had no impact at all upon the jury, permissible or otherwise.

1. In the first place, since no responsive answer was received to the question, and no attempt was ever made to establish the fact by independent means, the jury was never in fact told that petitioner had not testified at his prior trials. Because the question was in a leading form, petitioner assumes that the jury inferred the fact from the question. There is, however, no warrant for that assumption. For all the jury knew, petitioner had in fact testified at his prior trials and the question was put in that form only to provoke from him a vigorous denial that would undermine his pose of not remembering the prior trials.

Moreover, while there might be a danger that the jury would make such an inference had the question

been emphasized and their attention focused on its implications, there is every indication in the record that the question made no impression at all on the jury. It was asked, as we have noted, as the last of a long series of questions the subject matter of which was unimportant and the only purpose of which was to test petitioner's memory and comprehension. The focus of attention was not on the questions or the facts to which they related, but only on the quality and nature of petitioner's replies, the subject matter of the questions asked being quite incidental. In that context of the challenged question, it is hardly surprising that, when the motion for a mistrial was made immediately thereafter, the trial judge was not even aware of the question's having been asked. The surprising thing would rather be that the question had any more impact upon the jury.

In short, to establish the predicate upon which all of petitioner's arguments depend, it is necessary to assume (1) that the jury noted and focused attention on a question given so little emphasis that it was overlooked by the trial judge and (2) that the jury then improperly inferred the fact (*i.e.*, that petitioner had not testified at the earlier trials) from the leading form of the question. That there was no substantial likelihood of the jury's making that inference in the circumstances of this case is, we think, confirmed by the fact that defense counsel apparently did not consider that likelihood to be sufficiently great at the time even to warrant requesting an admonition to the jury that leading questions are not evidence of the facts assumed.

2. In the second place, there was no comment upon, or instructions permitting the use of, petitioner's failure to testify at the prior trials. As we have noted, the incident occurred on the second day of a five-day trial and at no other time during the course of the trial, in the closing arguments, or in the judge's charge, was any allusion made to petitioner's previous failure to testify. Thus, the most that can be claimed is that the jury was able to infer from the question the bare fact that petitioner had not testified at his prior trials. Plainly, however, the jury's bare knowledge of the fact that a defendant has not testified cannot be deemed *per se* to prevent a fair trial, for the jury is necessarily aware of that fact in every case in which the defendant does not take the stand—and, indeed, is often expressly told of it in the usual instruction that it is not to draw any inference from the defendant's failure to testify.[14] What is forbidden, rather, is hostile *comment* on the failure to testify, inviting the jury to draw an adverse inference from that fact; and not even an implicit invitation of that sort can be found here. There was simply the asking of an unanswered question, and that was the end of the matter.

3. The final difficulty with the claim of prejudice is even more fundamental. Let it be assumed that the jury did infer the fact from the question and, al-

[14] That charge may, of course, be given even though not requested by the defendant. See, *e.g.*, *Chadwick* v. *United States*, 117 F. 2d 902 (C.A. 5), certiorari denied, 313 U.S. 585; *Smith* v. *United States*, 112 F. 2d 217 (C.A. D.C.), certiorari denied, 311 U.S. 633; *Becher* v. *United States*, 5 F. 2d 45, 49 (C.A. 2), certiorari denied, 267 U.S. 602.

though no emphasis had been given the matter, that they believed that the fact was a highly significant one that should be brought to bear, if at all possible, in their deliberations. There still remains the logical difficulty, unanswered by petitioner and the dissenting opinion below, of how, in the unique circumstances of this case, that fact *could* be used by the jury, either permissibly or impermissibly. In our view, there was simply no way in which petitioner's previous failure to testify could have had any effect upon the jury's resolution of any of the issues material to this case—namely, petitioner's commission of the acts charged; the credibility of his testimony (*i.e.*, the *bona fides* of his purported irrationality); or petitioner's insanity at the date of the offense.

a. *Commission of the acts charged.*—The usual danger of admitting against a defendant who testifies at a second trial the fact that he did not testify at a prior trial is that the jury will use that evidence not only to discredit his denial of committing the acts at the second trial but to infer that he in fact did commit the acts, believing that if he had not he would have said so the first time. In this case, however, no attempt was made at the third trial itself to deny commission of the acts—either in petitioner's testimony or by other evidence—and the failure previously to deny that he committed the acts could add nothing to the failure to do so at the present trial. As a practical matter, the commission of the acts—established by virtually uncontrovertible evidence—was not in issue, and the sole defense was that of insanity. By the same token, the fact that petitioner had not pre-

viously testified could have substantially affected the outcome of this case only if it bore in some way on the issue of insanity, and we do not understand petitioner or the dissenting opinion below to suggest otherwise.

b. *Credibility of petitioner's testimony.*—Petitioner's "testimony" in this case, as we have noted, had no content other than the implied representation (by his irrational responses) that petitioner was, at the date of the trial, incompetent. The question of the "credibility" of that testimony, in turn, was whether petitioner was, as the Government thought, malingering in maintaining that pose. Use of petitioner's prior failure to testify to impeach that testimony—if it were logically relevant for that purpose—would presumably be permissible under *Raffel*, particularly since in this case the question of credibility (petitioner's mental state at the date of the trial) and the ultimate issue of guilt (petitioner's mental state at the date of the offense) are more readily separable than in the usual case.[15]

Whether permissible or not, however, the difficulty is that the prior failure to testify has no tendency to show whether or not petitioner was malingering at his third trial (*i.e.*, to "impeach" his "testimony" at the third trial). If petitioner were in fact the irrational person he purported to be at the third trial, then, even if it be assumed that his condition was the same at his previous trials, his failure to testify reflects only

[15] As we have noted above (p. 22), it was apparently for this purpose that the prosecutor and the court of appeals thought that the abortive attempt to develop the fact of petitioner's prior failure to testify was justified.

the capricious workings of a disordered mind. That is, since petitioner, if he was not feigning, obviously lacked the capacity to make a rational judgment whether or not to testify, his different conduct at the several trials shows only caprice rather than inconsistency. In addition, of course, petitioner cannot be assumed to have been in exactly the same mental state on the occasion of his several trials. Thus, like petitioner (Pet. Br. 8–9), we do not see in what way the jury might have used petitioner's prior silence to resolve the question whether or not he was malingering at his third trial.

c. *Insanity at the date of the offense.*—The "prejudicial effect" of which petitioner complains must, therefore, be in the danger that the jury would infer from his prior silence that petitioner was sane at the time of the offense. How such an inference might be drawn by the jury, however, neither he nor the dissenting opinion in the court of appeals undertakes to explain. The reasoning, we suppose, is this: (1) although a defendant alleging insanity is perhaps not the most reliable source of information about his own mental condition, if he were in fact insane at the date of the offense he would surely—unless he is now incompetent as well—have some relevant testimony to offer on that issue; (2) since he did not offer it, he must not have been insane. The difficulty with that, however, is that the defendant in this case did purport to be incompetent at the time of the trial. If the jury believed him to be incompetent at trial, as he claimed, that would fully explain his failure to give meaningful testimony of events surrounding, or his condition at

the time of, the offense. If the jury believed him to be malingering, on the other hand, then his prior failure to testify could add nothing to his refusal to testify meaningfully at the third trial and his attempt, instead, affirmatively to deceive the jury.

In summary, while we acknowledge the danger in the usual case that the jury will impermissibly infer guilt from a prior failure to testify, that is so only because of the force of the reasoning by which that inference may be drawn—*i.e.*, if the defendant had not committed the acts charged he would have said so. That reasoning, however, is inapplicable in the unique circumstances of this case, and no other chain of reasoning is apparent by which the jury might have used the fact of petitioner's prior silence—if indeed they inferred it to be a fact—for an improper purpose. There being no likelihood of an improper inference being drawn, the question asked, being otherwise competent and relevant as one of a series of memory-testing questions, was not improper.

D. THE RISK OF PREJUDICE, IF ANY, COULD HAVE BEEN AVOIDED BY APPROPRIATE INSTRUCTIONS, AND A MISTRIAL WAS NOT REQUIRED

In its procedural posture, and the precise nature of the error claimed, this case is unlike either *Grunewald* or *Raffel*, or for that matter any other case of which we are aware involving a reference to a failure to testify. The district court here did not tell the jury that petitioner's prior failure to testify could be used, even for a limited purpose; it did not permit argument to the jury on the inferences to be drawn;

it did not hold that evidence of that failure was admissible (and in fact it was never adduced); and, finally, it did not hold that the question was proper or refuse to admonish the jury to ignore it. Quite literally, all that occurred was that the prosecutor asked the question, the witness replied unresponsively, the petitioner moved for a mistrial, and the district court, without comment, denied the motion. Thus, it is the denial of a mistrial, and only that, that petitioner can assign as error, and to establish that as error he must show, not only that the question was improper or even that it may have had some prejudicial effect, but that the prejudicial effect was so great that nothing short of a mistrial could cure it. We may for purposes of this argument assume that the question was improper, for, even so, we submit that a mistrial was not required.

The usual procedure to challenge a question is, of course, to make an objection and to obtain, after argument, an express ruling by the court on the relevance, competence, and materiality of the question.[10] And if the objection is sustained, the defendant may, of course, also request an admonition to the jury to disregard it and to draw no inferences from its being asked. In this case, however, since the reply to the question was unresponsive, it made no difference that an objection was not made to the question before the witness answered and full curative relief was still

[10] One of the difficulties of this record, it may be noted, is that because that procedure was not followed, the relevance of the question, and the way in which it might properly be used, if at all, was never explored in the district court.

available to petitioner. Petitioner could, for example, have asked for—and as far as this record shows, obtained—a ruling striking the question and answer as immaterial, an admonition to the jury not to infer from the leading form of the question that petitioner had in fact failed to take the stand, and, if petitioner desired it out of a superabundance of caution, an instruction to the jury that no adverse inferences could in any event be drawn from a prior failure to testify.

Petitioner, of course, did not ask for any such curative admonitions to the jury but chose to use the incident instead in an attempt to obtain a mistrial. That the district court denied the motion for a mistrial does not mean, however, that it necessarily thought the question a proper one. More likely—since it was by far the simplest ground on which to dispose of the matter—it concluded that, since the question was never answered, no harm had been done whether or not the question was proper. Thus, nothing in that ruling implies that the court would have declined a request to admonish the jury not to infer facts from leading questions—a matter in no way dependent on the propriety of the question—or even a request to strike the question and answer as immaterial.

Nor can petitioner complain here of the court's failure so to admonish the jury on its own motion. In the first place, it is hardly error, plain or otherwise, for a court to assume that the jury knows, without an express admonition, that statements and questions by counsel are not themselves evidence. In the second place, there is no reason to believe that peti-

tioner's failure to request precautionary admonitions was due to inadvertence rather than a deliberate (and, indeed, sound) decision of counsel. The question, as we have noted, was the last of a series of questions to which only incoherent responses had been received. None of the questions previously asked had borne on facts material to the case and the focus of attention had been, not on the subject matter of the questions, but on petitioner's behavior on the stand. Asked in that context, the question—to which only another incoherent response was received—was given so little emphasis and had so little impact that not even the trial judge was aware of its having been asked. Under the circumstances, defense counsel—who, the record shows, were otherwise thorough and diligent in protecting petitioner's rights—could reasonably have concluded that the unanswered question had made no more impression upon the jury than upon the judge and that any admonition was not only unnecessary but would serve only to bring to the jury's attention the possible significance of the question. Even so, of course, they quite properly (from the petitioner's viewpoint) (outside the hearing of the jury) moved for a mistrial on the basis of the incident and carefully preserved that basis for appeal by renewing the motion at the close of the evidence and by assigning its denial as error in the motion for a new trial. It is, however, on the record thus made that petitioner must stand here, and he can prevail only by showing, not only that the question was improper in the sense that an objection to it should have been sustained, but that the mere asking of it had an

impact upon the jury so prejudicial that its effect could not have been cured by any appropriate instructions and irrevocably made the trial unfair.

Declaration of a mistrial is, of course, a remedy that is invoked only in extreme circumstances,[17] and the cases are legion holding that improper remarks or questions by counsel, either on the defendant's failure to testify[18] or other matters,[19] or even an exposure to the jury of inadmissible evidence,[20] can be cured by appropriate instructions. And this Court has applied that rule even to extended argument by counsel on the implications of the defendant's refusal,

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[17] For an example of such circumstances—which even then the Court seemed to view as a borderline case—see *Berger* v. *United States*, 295 U.S. 78, 84–89.

[18] *E.g.*, *Milton* v. *United States*, 110 F. 2d 556 (C.A. D.C.); *United States* v. *Di Carlo*, 64 F. 2d 15 (C.A. 2); *Knowles* v. *United States*, 224 F. 2d 168 (C.A. 10); *Nolen* v. *United States*, 190 F. 2d 418, 420 (C.A. 6); *Young* v. *United States*, 168 F. 2d 242, 245 (C.A. 10), certiorari denied, 334 U.S. 859; *Baker* v. *United States*, 115 F. 2d 533, 544 (C.A. 8), certiorari denied, 312 U.S. 692; *Morgan* v. *United States*, 31 F. 2d 385 (C.A. 7), certiorari denied, 280 U.S. 556; *Robilio* v. *United States*, 291 Fed. 975 (C.A. 6), certiorari denied, 263 U.S. 716.

[19] *E.g.*, *Dunlop* v. *United States*, 165 U.S. 486, 498; *Turner* v. *American Security & Trust Co.*, 213 U.S. 257, 267; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742; *United States* v. *Nimerick*, 118 F. 2d 464, 466 (C.A. 2), certiorari denied, 313 U.S. 592; *Spivey* v. *United States*, 109 F. 2d 181, 185 (C.A. 5), certiorari denied, 310 U.S. 631; *United States* v. *Ginsbury*, 96 F. 2d 882, 884 (C.A. 7), certiorari denied, 305 U.S. 620; *Lau* v. *United States*, 13 F. 2d 975, 976 (C.A. 8), certiorari denied, 273 U.S. 739.

[20] *E.g.*, *Hopt* v. *Utah*, 120 U.S. 430, 436–437; *Waldron* v. *Waldron*, 156 U.S. 361, 382–383; cf. *Delli Paoli* v. *United States*, 352 U.S. 232, 239–243.

on Fifth Amendment grounds, to answer particular questions put to him at the trial."

This is, of course, a capital case, and the Court should properly be concerned that substantial rights have not been foreclosed by a misstep of counsel. Even in a capital case, however, where the defendant has been represented by competent counsel whose action appears to have been the result, not of oversight, but of a deliberate judgment of the steps that will best serve the interests of the defendant, we do not believe that the asking of a single improper question by the prosecutor should automatically require a mistrial. At the very least, there ought to be required a showing, not only of something more than a

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" In *Johnson* v. *United States*, 333 U.S. 46, in a trial for income tax evasion for 1937, the government, to prove that the defendant received income from a numbers racket throughout 1937, asked the defendant whether he had continued to receive such income in 1938. The defendant refused to answer on the ground that, since his prosecution for 1938 was still open, the answers would tend to incriminate him, the claim of privilege being upheld by the trial court. In his closing argument to the jury, the prosecutor commented at length upon the claim of privilege. This Court, although holding that the comment was improper, affirmed the conviction on the ground that, since the prejudicial effect could have been cured by an appropriate instruction, the defendant had waived the error by failing to request such an instruction. The Court, in an opinion by Mr. Justice Douglas, said (p. 49; emphasis added):

> * * * We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. *Since the protection which could have been obtained* was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. * * *

remote possibility of prejudice, but also of the inadequacy of other measures to forestall that possibility.

In this case, we think, neither requirement is satisfied. As we have shown above, the possibility of prejudice has merely been assumed and, upon analysis, depends upon a series of propositions most of which are at best speculative and others of which are, we think, simply unsupportable: (1) that the jury took note of a question so little emphasized that not even the trial judge was aware of it; (2) that, although the question was never answered and the matter never again referred to, the jury inferred from the question itself the fact that petitioner had not testified at his prior trials; and (3) that the jury inferred from that fact, by a process of reasoning that was never suggested to it and has yet to be explained, that the petitioner was sane at the time of the offense. As to the inadequacy of other measures, short of a mistrial, to deal with the possibility of prejudice (if any), the Court is apparently asked to assume—though petitioner does not even deal with the question—that a jury will not follow even so simple and direct an instruction as one telling it to ignore a single irrelevant question and advising it that a leading question is not evidence of the facts answered. In short, since no more has been shown here, petitioner's position would seem to be that a mistrial is required whenever an improper question is asked—or an improper comment is made by counsel or a witness or inadmissible evidence is offered—from which it is possible for the jury to infer a fact that may, in some undisclosed way, prove to be prejudicial. Unless the principal of curative

instructions is to be abandoned entirely in capital cases, there has been no showing here, we submit, of a likelihood of prejudice so great that nothing short of a mistrial would be adequate to assure petitioner a fair trial.

We recognize that this is a capital case and properly subject to careful review, but even so it is difficult to believe that, in the context of this case, the asking of the single unanswered question, on a subject immediately abandoned when an incoherent reply was received and never again alluded to during the trial, could have had any possible effect on the verdict. As the court of appeals said (R. 394): "The disputed facts and conflicting expert opinions were properly submitted to a jury under instructions which were correct. The 12 jurors in the instant case, like 24 jurors before them, have rejected his claims and have found [petitioner] guilty." There is no reason for a different view of the matter here.

E. THERE IS NO OCCASION IN THIS CASE TO RECONSIDER *RAFFEL* V. *UNITED STATES*

As we have indicated above, in our view the sole question in this case is whether the question asked by the prosecutor—"This is the first time you have gone on the stand, isn't it, Willie?"—had a prejudicial effect on the jury. It is our view that it did not—or at least not so great an effect that it could not have been cured by appropriate instructions—and that the Court should hold no more than that whether or not the question should have been asked petitioner has not been prejudiced. If, on the other hand, the Court

should hold that the incident was prejudicial and the prejudice could not be overcome by curative instructions, then we concede that the question, though relevant for memory-testing purposes, did not have a sufficient probative value to justify the risk of prejudice and should not, under *Grunewald,* have been asked. Either way, therefore, the question of prejudice is controlling and there is no occasion here to reconsider *Raffel* v. *United States,* 271 U.S. 494.

It may help, however, in order to make clear why *Raffel* is not involved in this case, to suggest the kind of case that would present that question and the issues that it would raise. Suppose a defendant who did not take the stand at the first trial does testify at his second trial and offers a seemingly air-tight alibi. The prosecutor, on cross-examination, develops the fact that he had not previously testified and, by forcing the defendant to explain the inconsistency, succeeds in obtaining from him either a patently untenable explanation of his failure to offer the alibi at the first trial or, under the press of that line of cross-examination, an admission that the alibi was fabricated. In such a case, the prior failure to testify would, of course, be of great value in impeaching the defendant's testimony at the second trial—not only by use of the fact itself as evidence of inconsistency but, perhaps even more importantly, by providing a potent line of cross-examination. At the same time, however, there would be an obvious risk that the jury would infer guilt directly from the prior silence. Such a case, which would pose in its sharpest form the question decided in *Raffel,* would, of course, be fully distinguishable

from *Grunewald*. Unlike *Grunewald*, where the prior failure to testify was in a very different kind of proceeding (before the grand jury) and was fully explainable in terms of that difference, there is at least a surface inconsistency in the defendant's different action in the two trials identical in nature and, very likely, in the evidence introduced. And while there might be a satisfactory explanation of the different defense tactics, there would seem to be enough of an inconsistency to warrant—constitutional problems aside—an exploration of the question to seek out that explanation. And on the constitutional question—not reached in *Grunewald*—there may also be a theoretical difference in the scope of the "waiver" of the privilege in the two situations—*e.g.*, viewing an original criminal trial and a retrial as but one proceeding (compare their treatment for double-jeopardy purposes) so that the waiver in the second trial is equally a waiver of the privilege asserted in the first trial, but not considering a waiver in a criminal trial as a waiver of the privilege asserted in other or preliminary proceedings.

Those questions are, of course, difficult and important ones, and they ought be decided, we think, only in a case, such as that supposed, that puts the issues and the considerations bearing on them in sharp focus. The difficulty in this case is that, because of the insanity issue and, more particularly, petitioner's posture of incompetence at the third trial, the development of petitioner's failure to testify at his previous trials had, we think, neither discernible value to the government's case nor discernible impact on petitioner's

case. Being in that respect unique, this case is not, we submit, an appropriate vehicle for a re-examination of *Raffel*. And, since we concede the negligible value to the government's case of inquiry into petitioner's failure to testify at his prior trials, there is not, as we have noted, any necessity to deal with the *Raffel* question. The only question is whether, in conceding the lack of importance of the question to the government's case because of the logical difficulties in making use of petitioner's prior silence in the unique circumstances of this case, we are also right in our contention that, for essentially the same reasons, the question could not have been prejudicial to petitioner.

II

THE CROSS-EXAMINATION OF THE DEFENSE PSYCHIATRIST (E. Y. WILLIAMS) AS TO THE VIEWS OF A PROFESSIONAL COLLEAGUE UNDER WHOM DR. WILLIAMS TESTIFIED HE HAD RECEIVED TRAINING, AND WHETHER HE SHARED THOSE VIEWS, WAS NOT PREJUDICIAL ERROR

Despite the willingness of government counsel to stipulate to the qualifications of the defense witness, Dr. E. Y. Williams, an expert in psychiatry, the defense desired to have his qualifications enumerated "for the record" (R. 142). During the direct examination Dr. Williams stated that he had had some training and experience at St. Elizabeth's Hospital under Dr. Ben Karpman (R. 142). On cross-examination, after Dr. Williams repeated that he had studied under Dr. Karpman, the following colloquy occurred (R. 167):

Q. Do you know, and don't you know as a fact, Doctor Karpman is one of those psychiatrists that subscribes to the view that every time a person commits a crime that that person is suffering under some mental disorder?

A. Doctor Karpman has never so expressed that to me in my studies with him.

Q. Tell me, sir, do you subscribe to that view?

A. No, sir. I have, each case that I see, I study and come to my own opinion.

* * * * *

Q. Have you not so testified that you have never examined a person in a criminal case and found that person of sound mind?

A. No, sir, I don't remember saying that to you or anybody in the United States. * * *

On redirect examination, Dr. Williams stated that Dr. Karpman's reputation in the field of psychiatry was of the finest (R. 188).

On the ground that the cross-examination was irrelevant and inflammatory, petitioner moved for a mistrial. The motion was denied by the trial court (R. 169).

It is a familiar principle that the range and scope of cross-examination of an expert witness is primarily a matter within the sound discretion of the trial judge. See, 2 Underhill, *Criminal Evidence* (5th ed. 1956), p. 790; 2 Wharton, *Criminal Evidence* (12th ed. 1955), p. 354. He may be questioned as to principles contained in reputable medical journals or other standard treatises to test statements made by him which are based on other professional works. Cf. *Reilly* v. *Pinkus*, 338 U.S. 269, 275. In this case, Dr. Williams,

in giving his qualifications, testified that he had studied under Dr. Karpman, a psychiatrist at St. Elizabeth's Hospital. It was not inappropriate to ask him whether he was aware of Dr. Karpman's views concerning the relationship between criminality and emotional disorder,[22] both to determine whether he was cognizant of the position taken by an eminent psychiatrist of the District of Columbia and to determine his own views on criminal responsibility.

In any event, as the majority below pointed out, the inquiry produced "nothing except a positive disavowal by the witness of the viewpoint attributed to Dr. Karpman" (R. 389), and therefore, even if improperly asked, the question was totally harmless in effect.[23]

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[22] Dr. Karpman's views on this matter have long been the subject of notice. He has stated: "* * * I belong to the small group of psychiatrists who hold the thesis that criminality is without exception symptomatic of abnormal mental states and is an expression of them." Karpman, *Criminality, Insanity and the Law*, 39 J. Crim. L. & Crimin. 584 (1949); see also, Karpman, *Criminal Psychodynamics*, 47 J. Crim. & Crimin. 8 (1956).

[23] Petitioner also raises (Br. 3), but does not argue, the issue whether the trial judge committed reversible error in not charging the jury that it could convict him of second degree murder on the evidence of his low intelligence quotient. This is a matter which this Court has held to be peculiarly within the province of the District of Columbia courts to determine for themselves. *Fisher* v. *United States*, 328 U.S. 463, 476. On at least two occasions, since *Fisher*, the Court of Appeals for the District of Columbia has specifically refused to adopt a rule of "diminished responsibility." On the first appeal of this case (some six years ago) the court deemed it inappropriate to consider the doctrine "until we can appraise the results of the broadened test of criminal responsibility which we recently announced in *Durham*." 214 F. 2d at 883. The *Durham* rule of insanity (214

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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F. 2d 862) has not been so thoroughly "appraised" in the six years since its adoption as to suggest that now is an appropriate time for reconsideration of the diminished responsibility rule. See Wechsler, *The Criteria of Criminal Responsibility*, 22 U. of Chi. L. Rev. 367 (1955); Krash & Levine, *Memorandum of Dissent*, 26 Journ. Bar Assoc. of D. of C. 316, 330–331 (1959). But, be that as it may, in this very appeal, the majority of the court below rejected the judicial adoption of the rule, considering it to be a problem more appropriately to be dealt with legislatively than in adversary judicial proceedings (R. 391). Unless this Court is ready to overrule *Fisher*, and petitioner suggests no reasons why it should, it should honor this latest decision of the local appellate tribunal.

Nor is there any merit to the other unargued issue that the trial judge erred in not explaining to the jury the meaning of "sound memory and discretion." D.C. Code 22–2401. This language means no more than that the jury must decide whether the defendant was sane or not. *Hill* v. *United States*, 22 App. D.C. 395 (1903). Careful instructions were given the jury on the insanity issue (see R. 371–372).

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